

**IN THE HIGH COURT OF MALAYA
AT KUALA LUMPUR
ORIGINATING SUMMONS NO. WA-24C-218-10/2019**

BETWEEN

TANY SERVICES SDN BHD

PLAINTIFF

AND

HAMZAH JAAFAR (P) SDN BHD

DEFENDANT

HEARD TOGETHER WITH

**IN THE HIGH COURT OF MALAYA
AT KUALA LUMPUR
ORIGINATING SUMMONS NO. WA-24C-241-11/2019**

BETWEEN

HAMZAH JAAFAR (P) SDN BHD

PLAINTIFF

AND

TANY SERVICES SDN BHD

DEFENDANT

GROUND OF DECISION

Introduction

[1] This are cross applications to set aside and enforce an adjudication decision made under the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”).

[2] The Plaintiff in KLHC Originating Summons no. WA-24C-218-10/2019 (“OS 1”) and the Defendant in KLHC Originating Summons no. WA-24C-241-11/2019 (“OS 2”) is a private limited company involved in the construction business.

[3] The Defendant in OS 1 and the Plaintiff in OS 2 is likewise a private limited company involved in the construction business.

[4] For ease of reference, the parties will hereinafter be referred as TS and HJ respectively.

Background and Preliminary

[5] The Government of Malaysia appointed TS to construct and complete the project named as “Cadangan Menaiktaraf Sekolah Menengah Vokasional Kuala Kangsar Kepada Kolej Vokasional Kuala Kangsar, Perak” (“Project”)

[6] TS accordingly appointed HJ as its sub contractor to undertake the Project pursuant to a contract dated 1 February 2018 (“Contract”).

[7] There were disputes and differences that arose between the parties pertaining to non payment of interim payments by TS to HJ under the Contract.

[8] As a result, HJ initiated adjudication proceedings pursuant to the CIPAA against TS and the director of the Asian International Arbitration Centre appointed Peter Leong Peng Chiew as the adjudicator (“Adjudicator”).

[9] After having considered the adjudication claim, adjudication response and adjudication reply submitted by the parties, the Adjudicator on 11 October 2019 made his decision against TS by ordering payment of the sum of RM867,837.88 together with costs of RM23,054.47 to KJ (“Decision”).

[10] TS is dissatisfied with the Decision and has on 23 October 2019 filed OS 1 to set aside the Decision.

[11] The affidavits which were filed for purposes of OS 1 are as follows:

- (i) TS's affidavit in support affirmed by Dato' Haji Mohd Nordin bin Mohammad dated 21 October 2019;
- (ii) HJ's affidavit in reply affirmed by Mat Zin bin Yusof dated 25 November 2019;
- (iii) TS's affidavit in reply affirmed by Dato' Haji Mohd Nordin bin Mohammad dated 9 December 2019; and
- (iv) TS further affidavit affirmed by Dato' Haji Mohd Nordin bin Mohammad dated 14 July 2020.

[11] However and since HJ has not been paid by TS as ordered in the Decision, HJ has on 21 November 2019 therefore filed OS 2.

[12] The affidavits which were filed for purposes of OS 2 are as follows:

- (i) HJ's affidavit in support affirmed by Mat Zin bin Yusof dated 21 November 2019;
- (ii) TS's affidavit in reply affirmed by Dato' Haji Mohd Nordin bin Mohammad dated 24 December 2019;
- (iii) HJ's affidavit in reply affirmed by Mat Zin bin Yusof dated 1 January 2020; and

- (v) TS's further affidavit affirmed by Dato' Haji Mohd Nordin bin Mohammad dated 16 July 2020.

[13] Both OS 1 and OS 2 came before me for hearing on 27 August 2020. At the outset, the parties consented that if OS 1 is refused, OS 2 will be allowed as a matter of course and *vice versa*.

[14] HJ made a preliminary objection on the admissibility of the TS's further affidavit in both OS 1 and OS 2 that it was filed out of time without leave of the Court long after the exchange of affidavits were closed.

[15] After hearing brief submissions, I upheld the preliminary objection based on the Court of Appeal decision of ***Lum Choon Realty Sdn Bhd v Perwira Habib Bank (M) Sdn Bhd*** [2003] 4 MLJ 409. In that case, Mokhtar Sidin JCA held as follows:

"We were wondering how the respondent was allowed to file and use that affidavit. It is to be noted that the proceedings of this application are by way of affidavit evidence. As such in our view when the parties begin their submission the evidence by way of affidavits is deemed to be closed and the parties are only allowed to submit on the evidence as found in the various affidavits..."

Likewise here, the parties have already filed their written submissions, TS further affidavits filed for purposes of OS 1 and OS 2 must be discarded.

[16] Consequently after hearing oral arguments of counsel and having earlier read their written submissions, I dismissed OS 1 with costs of RM3,500.00 subject to 4% allocator and allowed OS 2 with costs of RM 3,5000.00 subject to 4% allocator.

[17] TS is dissatisfied with my decisions and has filed its appeal to the Court of Appeal.

[18] I therefore furnish the grounds of my decision below.

Contentions and Findings

[19] In respect of OS 1, TS basically contended that the Adjudicator denied TS natural justice and is therefore justified to set aside the Decision pursuant to s.15 (b) of the CIPAA.

[20] According to TS, the Adjudicator was confused and acted unfairly by having taken took a restrictive view of his jurisdiction. In this regard, the Adjudicator did not inform the parties the required procedure in advance. Furthermore he allegedly did not consider the payment

response and adjudication response of TS notwithstanding TS has pleaded that the payment HJ's payment claim is denied. It has been plainly pleaded by TS as follows:

"Paragraph 9, part of paragraph 14 and paragraphs 35, 40, 41, 42, 56, 58, 59, 62, 63, 64 and 68 of the Claimant's Adjudication Claim did not show any claim against the Respondent but merely argued and/or highlighted on the case law and/or CIPAA provision which is not to be argued at the claim's stage and therefore the Respondent denies the paragraphs and put the Claimant to strict proof thereof."

Since HJ's adjudication claim is large and the Adjudicator therefore ought to have requested TS to produce the supporting documents to substantiate its pleaded defence as provided in s. 25(i) of the CIPAA during case management before hearing the parties. It is necessary that the Adjudicator convene a trial to hear the parties here, particularly because the Adjudicator was confronted with an 'unclear rebuttal' by TS. However, the Adjudicator has failed to do so. TS was hence denied of the opportunity to fully defend itself and referred and relied on the case of ***Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia* [2017] MJLU 673** in support of its contention.

[21] Additionally, TS contended that the Adjudicator has to still nonetheless consider the merits of HJ's adjudication claim. The Adjudicator failed to do so and TS relied on the case of ***Yanjian Group Construction (M) Sdn Bhd v CMMC Sdn Bhd and Another Summons* [2019] MLJU 1121**. As a result, the Adjudicator gave unfair tactical advantage in favour of HJ and reliance is made to the case of

***Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd and Another Case* [2017] MLJU 377.**

[22] Finally, TS complained that the Adjudicator has unfairly denied TS to hold a trial by reason of the strict statutory timeline fixed by the CIPAA. TS emphasized that whilst ‘justice delayed is justice denied’, but ‘justice rushed is no justice at all’. In this regard, TS failed to invoke s. 25 (f) and (g) of the CIPAA and again referred and relied on the case of ***Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia* (supra)** and the Court of Appeal case of ***Guangxi Dev & Cap Sdn Bhd v Sycal Bhd* [2018] MLJU 1542.**

[23] In opposition, HJ basically contended that the Adjudicator had properly and fairly conducted the adjudication proceedings and thereafter made an enforceable Decision. He had considered all the submissions made to him by the parties and has decided all the right questions referred to him by the parties within his jurisdiction. In this regard, HJ referred and relied on the cases of ***AMT Engineering Services Sdn Bhd and AH Design Communication Sdn Bhd* [2018] MLJU 1860** and ***PWC Corp Sdn Bhd v Ireka Engineering & Construction Sdn Bhd and Another Appeal* [2018] MLJU 152** as well as ***PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd and Another Suit* [2017] MLJU 905.**

[24] It is provided as follows in s.15 of the CIPAA:

“An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially; or

(d) the adjudicator has acted in excess of his jurisdiction.”

The burden to establish one or more of the vitiating grounds in s. 15 of the CIPAA rests on the applicant but generally it is a relatively heavy burden to discharge seen from the cases that have been instituted in the courts particularly the Construction Court. Setting aside an adjudication decision has been the exception rather than the norm depending, of course, on the unique facts and circumstances of each case.

[25] As to natural justice which is the sole ground relied upon by TS, David Wong Dak Wah JCA (later CJSS) held as follows in the Court of Appeal case of **ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd (and Another Appeal)** [2016] MLJU 1776:

“[21] There were no complaints by the appellant that the adjudicator had got the disputes on a completely wrong footing. In fact, no complaint was made at all and the adjudication process was carried out premised on those issues. If we were to consider the complaints of the appellant, we would be looking into the merits of the decision of the adjudicator. In the context of s 15 of CIPAA 2012, it cannot be the function of the court to look into or review the merits of the case or to decide the

facts of the case. The facts are for the adjudicator to assess and decide on. The court's function is simply to look at the manner in which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the appellant. In the context of this case, the complaints of the appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us."

[26] From my perusal of the TS's arguments on denial of natural justice, it is obvious to me that TS has wrongly assumed that the adjudication proceedings is akin to civil litigation in court which sequentially undergoes the pleading stage followed by the case management stage where the documentary evidence is adduced followed by trial where the *viva voce* evidence is then adduced followed by closing submissions stage with case authorities tendered.

[27] As for the so called pleadings in the adjudication proceedings, it is provided as follows in ss. 9 to 11 of the CIPAA:

"9. Adjudication Claim

(1) The claimant shall, within ten working days from the receipt of the acceptance of appointment by the adjudicator under subsection 22(2) or 23(2), serve a written adjudication claim containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.

(2) The claimant shall provide the adjudicator with a copy of the adjudication claim together with any supporting document within the time specified under subsection (1).

10. Adjudication Response

(1) The respondent shall, within ten working days from the receipt of the adjudication claim under subsection 9(1), serve a written adjudication response which shall answer the adjudication claim together with any supporting document on the claimant.

(2) The respondent shall provide the adjudicator with a copy of the adjudication response together with any supporting document within the time specified under subsection (1).

(3) If the respondent fails to serve any adjudication response, the claimant may proceed with the adjudication after the expiry of the time specified under subsection (1).

11. Adjudication Reply

1) The claimant may, within five working days from the receipt of the adjudication response, serve a written reply to the adjudication response together with any supporting document on the respondent.

(2) The claimant shall provide the adjudicator with a copy of the adjudication reply together with any supporting document within the time specified under subsection (1)."

It is therefore plain that the parties must submit all supporting documents and this necessary include all evidence to support the claim or defence upfront.

[28] In ***Mammoth Empire Construction Sdn Bhd v STAM Engineering Sdn Bhd (and Another Case)*** [2019] 3 CLJ 718, Vazeer Alam J (now JCA) held as follows:

"[18] I find that the CIPAA does not afford the respondent an opportunity to be orally heard at a hearing convened for that purpose. Now, s 10(1) and (2) of the CIPAA

clearly provides that the respondent shall serve a written adjudication response together with any supporting documents on the claimant and the adjudicator within ten days from receipt of the adjudication claim. Thus, the respondent ought to have availed itself of this right and served all documents that it intends to rely on when the adjudication response was filed. This view is shared by the learned author Professor Sundra Rajoo in his book entitled "A Practical Guide to Statutory Adjudication in Malaysia" in the following words:

"The Adjudication Response is meant to be an answer to the Adjudication Claim and must enclose with it all the documents that the Respondent seeks to rely."

[19] The fact is that the respondent was given ample opportunity to present all the documentary evidence that it seeks to rely on and be heard on it by way of written submissions. The respondent chose not to comply with the statutory rights prescribed in the CIPAA, and in particular s 10(1) and (2), and serve its documents in the manner and time prescribed. Having made that choice, the respondent will have to live with it, and cannot now be heard to complain about breach of natural justice and/or the adjudicator having acted in excess of jurisdiction."

Furthermore in ***Kayangan Kemas Sdn Bhd v TMT Solutions Sdn Bhd & Another Case [2019] 1 LNS 1588***, I have held as follows:

"[23] Based on the scheme as envisaged in the CIPAA, the parties are obliged to adduce all relevant evidence in adjudication claim, adjudication response and adjudication reply submitted pursuant to s. 9 to 11 of the CIPAA respectively. In this connection, the parties are in my opinion obliged to enclose together all relevant documentary evidence as well as testamentary evidence of witnesses by way of statutory declarations."

[29] That notwithstanding, it is also common practice for parties to submit full arguments together with accompanying legal authorities. This is unlike concise pleadings in civil litigation which is governed by Order 18 of the Rules of Court 2012.

[30] On the facts here, TS's adjudication response (see paragraph [20] above) in answer to HJ's adjudication claim is bald and shoddy. It is devoid of any supporting documents statutorily required to be included.

[31] The learned Adjudicator held as follows:

"I have gone through the Adjudication Claim thoroughly and was hoping the Respondent would provide a clear rebuttal to the claims made. I had exercised the Powers of the Adjudicator to allow an extension of time solely for this purpose despite some initial objection by the Claimant. The Adjudication Response was very brief and did not fully address the issues. The Payment History by the Employer (MOE) to the main contractor who is the Respondent shows relatively promptly payment and even if we used the "back to Back" payment terms, the Respondent should have paid the Claimant after deducting the License Fee. Therefore, I do not see any valid reason why the Claimant is not paid."

[32] It is plain that the Adjudicator had considered the merits of HJ's adjudication claim contrary to that alleged by TS. The case of ***Permintex JSK Resources Sdn Bhd v Follitile (M) Sdn Bhd and Another Case (supra)*** relied by TS is hence irrelevant. I therefore find that the complaint by TS that the Adjudicator was confused and acted unfairly by having denied TS procedural fairness in presenting its defence fallacious without merit whatsoever. TS itself is the author of its own adversity.

[33] I am mindful that TS also complained that the Adjudicator ought to have exercised the provisions in s. 25 (f), (g) and (i) of the CIPAA so that

justice is not denied to TS. It is provided as follows in s. 25 of the CIPAA:

“25. Powers of the adjudicator

The adjudicator shall have the powers to-

- (a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;*
- (b) order the discovery and production of documents;*
- (c) set deadlines for the production of documents;*
- (d) draw on his own knowledge and expertise;*
- (e) appoint independent experts to inquire and report on specific matters with the consent of the parties;*
- (f) call for meetings with the parties;*
- (g) conduct any hearing and limiting the hearing time;*
- (h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;*
- (i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;*
- (j) issue any direction as may be necessary or expedient;*
- (k) order interrogatories to be answered;*
- (l) order that any evidence be given on oath;*
- (m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;*
- (n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;*

(o) award financing costs and interest; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.”

According to TS as I understand it, there would have been the opportunity for TS to fully present its defence if the Adjudicator had afforded TS a trial or the Adjudicator himself inquisitorially enquired from TS for proof of its defence.

[34] However, it is plain and trite that it is the Adjudicator’s power but not his duty to exercise any of the provisions set out in s. 25 of the CIPAA. The Adjudicator is the master of the procedure as far as the adjudication proceedings is concerned. There is no mandatory requirement of the Adjudicator to conduct pre trial case management or hold a trial unlike that in civil litigation as presumed and/or desired by TS. Again in ***Kayangan Kemas Sdn Bhd v TMT Solutions Sdn Bhd & Another Case (supra)***, I have held as follows:

“[25] In my view, the Adjudicator cannot be faulted to have committed procedural unfairness if KK chose to adduce its evidence in instalments as is the case herein. The burden of adducing sufficiency of evidence always lie with the parties and that must be done within the prescribed CIPAA scheme. It must not be forgotten that the object of statutory adjudication under the CIPAA is speedy dispute resolution with the prescribed statutory time frames unless otherwise extended by consent of the parties. The exercise of the power to hold an oral hearing is therefore discretionary on the part of the Adjudicator within his time constraint. He may opt to do so, if say, there is conflicting testamentary evidence produced via statutory declarations and the veracity has to be tested via cross examination.

[26] In the circumstances, I consequently find and hold that the Adjudicator had not denied KK natural justice notwithstanding he has refused KK from tendering viva

voce evidence in an oral hearing. He rightly entertained the TMTS's objection to the Applicant's request for an oral hearing thereto and he had afforded equal opportunity both parties to further make written submissions based on the documentary evidence already adduced before him pursuant to his power conferred under s. 25(j) of the CIPAA..."

[35] I find that TS's predicament is not dissimilar to that faced by Kayangan Kemas Sdn Bhd in that case by wanting to adduce its evidence progressively in instalments during the adjudication proceedings. I find that the facts in the cases of ***Guangxi Dev & Cap Sdn Bhd v Sygal Bhd (supra)*** and ***Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia (supra)*** specifically relied upon by TS are therefore distinguishable. By the failure of TS to adduce its requisite evidence upfront in its adjudication response, I find that the Adjudicator is right to discard TS' defence in that TS has failed to discharge its burden of proof to do so.

[36] Consequently, I find that the ultimate argument of TS that 'justice rushed is no justice at all', although sounded superficially attractive, has neither foundation nor justification here whatsoever. The real problem encountered is caused by the inexpert conduct of the adjudication proceedings by TS.

[37] I therefore find and hold that TS did not make out a meritorious application pursuant to s. 15(1)(b) of the CIPAA that natural justice was indeed denied. OS 1 must accordingly be dismissed.

[38] It follows that OS 2 must accordingly be allowed as agreed to by the parties (see paragraph [13] above) pursuant to s. 28 of the CIPAA which provides:

“28. Enforcement of adjudication decision as judgment

(1) A party may enforce an adjudication decision by applying to the High Court for an order to enforce the adjudication decision as if it is a judgment or order of the High Court.

(2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.

(3) The order made under subsection (2) may be executed in accordance with the rules on execution of the orders or judgment of the High Court.”

Besides, I am also satisfied that the HJ has met the requirements as set out in the case of ***Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd*** [2018] 1 LNS 428 and in the Court of Appeal case of ***Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd*** [2019] 2 CLJ 229.

Conclusion

[39] It is for the foregoing reasons that I dismissed OS 1 and allowed OS 2 as so ordered.

Dated this 7 October 2020

t.t.

**LIM CHONG FONG
JUDGE
CONSTRUCTION COURT
HIGH COURT KUALA LUMPUR**

COUNSEL FOR THE PLAINTIFF IN OS1

**AND DEFENDANT IN OS 2: NUR SHAFIKA BINTI MUSTAFFA
(IEZZAN IBURDANISHA IBRAHIM WITH HER)**

SOLICITORS FOR THE PLAINTIFF IN OS 1

AND DEFENDANT IN OS 2: SHAHARUDDIN HIDAYU & MARWALIZ

COUNSEL FOR THE DEFENDANT IN OS 1

AND PLAINTIFF IN OS 2: ZAIYANAZARETH BINTI ZAINI

SOLICITORS FOR THE DEFENDANT IN OS 1

AND PLAINTIFF IN OS 2: ZAIYANAZARETH & ASSOCIATES